

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPC/0011**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

NGOSA ALBUES MAKALU



PLAINTIFF

**AND**

DOUGLAS CHILOMBO SILUMBWE

1<sup>ST</sup> DEFENDANT

(T/A D.C BUILDMANN SUPPLY)

RURAL ELECTRIFICATION AUTHORITY

2<sup>ND</sup> DEFENDANT

FIRST NATIONAL BANK ZAMBIA LTD

3<sup>RD</sup> DEFENDANT

**Before the Hon Lady Justice Irene Zeko Mbewe.**

*For the Plaintiff:*

*Mr. S. Mbewe of Messrs Keith Mweemba*

*For the 1<sup>st</sup> Defendant:*

*Ms C. K. Mulenga of Mesdames CKM  
Associates*

---

## **R U L I N G**

---

### **Cases Referred To:**

1. *Mweemba v Chikankanta 2013/HP/1654*
2. *Tobacco Board of Zambia v Chishimba Konde 2013/HP/1527 unreported*
3. *Musa Ahmed Adam Yusuf v Mahtani Group of Companies and Others 2011/HPC/008 unreported*
4. *Drummond Jackson v British Medical Association [1970] 1 ALL E R 1094*
5. *Riches v Director of Public Prosecutions [1973] 2 All E R 935*



6. *Re Vernazz* [1959] 2 ALL E R 200
7. *Milington v Loring* [1881] 6 QBD 190
8. *Re Coghlan (deceased) Briscoe v Broughton* [1948] 2 All E R 68
9. *Attorney-General of Duchy of Lancaster v London North Western Railways* [1892] 3 Ch 277
10. *Farrell v Secretary of State for Defence* [1980] 1 ALL E R 166
11. *Zeiss Stiftung v Ranjuer and Keeler Limited and Others* [No. 3] 1970 Ch.D 506
12. *Hubbuck and Sons Ltd v Wilkinson, Heywood and Clark Ltd* (1899) 1 Q. B 86
13. *Dawkins v Prince of Edward Save Weimber* [1976] 1 Q.B 499
14. *Belmont Finance Corporation Limited v Williams Furniture Limited* [No 2] [1980] 2 ALL E R 393
15. *RR deceased* [1950] 2 ALL E R 117
16. *Willis v Earl Beauchamp* [1886] L.R 11 P.D 59

#### **Legislation Referred To:**

1. *Rules of the Supreme Court, 1999 Edition*
2. *High Court Rules, Cap 27 of the Laws of Zambia*

This is a Ruling on the 1<sup>st</sup> Defendant's application for summons to strike out originating process and expunge it from the record pursuant to **Order 14A (1), Order 33 Rule 7 and Order 18 Rule 19, Rules of the Supreme Court, 1999 Edition.**

According to the affidavit in support of the application deposed to by Douglas Chilombo Silumbwe the 1<sup>st</sup> Defendant herein, the

Statement of Claim contains scandalous, vexatious and irrelevant paragraphs. It is deposed that the originating process be struck off and expunged from the record.

Counsel for the 1<sup>st</sup> Defendant in her skeleton arguments begins the submission by referring to **Order 14A (1) and Order 33 Rule 7 of the Rules of the Supreme Court, 1999**. Counsel then argues that the averments which are scandalous, vexatious and irrelevant as paragraphs 3, 4, 12, 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41, 44. 45.46 and 47 and relied on the case of **Mweemba v Chikankata**<sup>1</sup>. In respect to striking out pleadings on account of abuse of court process, Counsel relied on the case of **Tobacco Board of Zambia v Chishimba Konde**<sup>2</sup>. Counsel **cited** the case of **Musa Ahmed Adam Yusuf v Mahtani Group of Companies**<sup>3</sup> in support of the proposition that an opponent's pleading can be wholly dismissed. Counsel submitted that the Court's power to strike out should be exercised in obvious cases and drew the Court's attention to the case of **Drummond Jackson v British Medical Association**<sup>4</sup> and **Riches v Director of Public Prosecutions**<sup>5</sup>. It is Counsel's prayer that the application for

striking out and expunging the originating process from the record be granted.

In response to the application, the Plaintiff filed an affidavit in opposition deposed to by Ngosa Albues Makalu the Plaintiff herein. It asserts that contrary to paragraph 2 of the affidavit in support of the application wherein the deponent describes himself as the Plaintiff, that the 1<sup>st</sup> Defendant is not the Plaintiff and therefore has no authority to swear the affidavit in support. The deponent further asserts that the contents of paragraph 3 of the affidavit in support of the application is devoid of necessary and sufficient facts as neither specific paragraphs nor a pleading has been exhibited. The deponent asserts that only a pleading or an endorsement can be struck out from the record and not an originating process as averred in the 1<sup>st</sup> Defendant's affidavit in support of the application.

In the skeleton arguments, Counsel for the Plaintiff submits that their action cannot at this stage be stifled because no action or proceeding can be said to be scandalous, frivolous or vexatious if the Statement of Claim or process discloses a cause of action. Counsel cites a plethora of cases **Re Vernazz** <sup>6</sup>. Counsel submits

that allegations of dishonesty and outrageous conduct are not scandalous if relevant to the matter and drew the Court's attention to the case of **Milington v Loving**<sup>7</sup>. In terms of the principles under **Order 18 Rule 19 Rules of the Supreme Court, 1999 Edition** that a party seeking to have a pleading struck out bears a heavy evidential burden of proof, and Counsel for the Plaintiff cites the case of **Re Coghlan (deceased) Briscoe v Brighton** <sup>8</sup>.

In respect to the impugned paragraphs being frivolous and vexatious, Counsel for the Plaintiff relies on the case of **Attorney General of Duchy of Lancaster v London and North-Western Railways Company** <sup>9</sup>. Counsel submits that striking out of a pleading should be done sparingly and urged the Court to dismiss the application with costs as it lacks merit and is an abuse of Court process.

At the hearing of the application, both parties relied on their respective affidavits and skeleton arguments. Both Counsels augmented their skeleton arguments with oral submissions which were more or less are similar to the skeleton arguments.

In determining the application before me, I have carefully taken into consideration the parties' respective affidavit evidence, skeleton arguments and list of authorities.

The issue for my determination is twofold, whether or not to dismiss the action, and whether or not to strike out the pleading on the grounds that it is scandalous, vexatious, and frivolous and an abuse of court process.

The 1<sup>st</sup> Defendant's application is premised on **Order 14A (1), Order 33 Rule and Order 18 Rule 19 (b) Rules of the Supreme Court, 1999 Edition** as read with **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia.**

**Order 14A (1) of the Rules of the Supreme Court** provide as follows:

*"(1) The Court may upon application of a party on its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court hat -*

- (a) *such question is suitable for determination without a full trial of the action;*
- (b) *such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

(2) *Upon such determination, the court may dismiss the cause or matter or make such order or judgment as it thinks just.*

**Order 33 Rule 7 of the Rules of the Supreme Court, 1999**

**Edition** *provides as follows:*

*"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary. It may dismiss the cause or matter or make such order or give such judgment therein as may be just."*

**Order 18 Rule 19 of the Rules of the Supreme Court, 1999**

**Edition** *states as follows:*

*(19) (1) The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the endorsement of any writ in the action of anything in any pleading or in the endorsement on the ground that:*

- (a) it discloses no reasonable cause of action or defence as the case may be;*
- (b) it is scandalous, frivolous or vexatious;*
- (c) it may prejudice or embarrass or delay the trial of the action; or*
- (d) it is otherwise an abuse of court process of the court and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be."*

A reading of the 1<sup>st</sup> Defendant's affidavit in support of this application in paragraph 2 refers to the deponent as the Plaintiff instead of 1<sup>st</sup> Defendant. In my view, this is merely a misnomer and not fatal to the application, as it is curable. In the interest of justice, and in exercising my inherent jurisdiction, I shall proceed to

determine the application and deem the 1<sup>st</sup> Defendant correctly described.

Counsel for the 1<sup>st</sup> Defendant premised her application on **Order 14A (1) and Order 33 Rule 7 of the Rules of the Supreme Court, 1999 Edition. Order 14A (1) of the Rules of the Supreme Court, 1999 Edition** gives the Court discretionary power to determine any question of law or construction of any document arising from any cause or matter for determination without a full trial, wherein the Court has the power to dismiss the cause or matter or make such order as it thinks just. In **Order 33 Rule 7 Rules of the Supreme Court, 1999 Edition** where it appears to the Court that the decision of any question or issue arising on a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, the Court may proceed to dismiss the matter.

I hasten to add, as rightly observed by Counsel for the Plaintiff that though Counsel for the 1<sup>st</sup> Defendant made the application under **Order 14A (1) and Order 33 Rule 7 Rules of the Supreme Court, 1999 Edition**, there is no argument tendered in this respect.

Counsel for the 1<sup>st</sup> Defendant relies on **Order 18 Rule 19 (1) Rules of the Supreme Court, 1999 Edition**, where the Court has inherent jurisdiction to strike out pleadings which are frivolous, vexatious or scandalous; or where it may prejudice, embarrass or delay the trial of the action; or is otherwise an abuse of the process of court. This power is discretionary and must be exercised with great circumspection and only where it is perfectly clear and obvious.

The 1<sup>st</sup> Defendant's main contention is that the originating process be struck off and expunged from the record. Paragraph 3 of the 1<sup>st</sup> Defendant's affidavit in support of this application states as follows:

**"3. That I am reliably informed by my Counsel that the statement of claim contains scandalous, vexatious and irrelevant paragraphs."**

Counsel for the Plaintiff vehemently denies this assertion.

In determining this matter, the starting point is to set out the purpose of pleadings. In the English case of **Farrell v Secretary of State for Defence** <sup>10</sup> it was per curiam stated that:

**“The primary purpose of pleadings, which is to define the issues and thereby to inform the parties in advance of the case that they have to meet and enable them to take steps to deal with it still remains and can still prove of vital importance.”**

Therefore, pleadings should define with clarity and precision the issues to be tried. Against this backdrop, in striking out any pleadings, there are well established principles which guide the Court in exercising its discretionary power under **Order 18 Rule 19 (1) Rules of the Supreme Court, 1999 Edition**. Striking out must be exercised sparingly and only in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of their right to have the action determined in a full trial. This entails that the Court ought to act cautiously and carefully and consider all facts of the case.

In setting out the principles to be considered in striking out a pleading, Dankwerts Lord Justice in the case of **Zeiss Stifling v Ranguer and Keeler Limited** <sup>11</sup> had this to say:

**"The power to strike out any pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading"**

In **Hubbuck and Sons Ltd v Wilkinson Heywood and Clark Ltd** <sup>12</sup> cited by Counsel of the Plaintiff, Sir N. Lindley MR at page 91 held that:

**"...a pleading will only be struck out under Order 18 Rule 19 Rules of the Supreme Court in a plain and obvious case where it is apparent that even if the facts are proved, the Plaintiff is not entitled to the relief that he seek."**

In **Drummond Jackson v British Medical Association** <sup>4</sup> it was held that:

**"The summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where**

**the alleged cause of action, on consideration only of the allegations in the pleading, was certain to fail.”**

At page 1094 of the same case, that -

**"A Court must exercise power to strike out sparingly"**

From the cited authorities and principles, it is apparent that the act of striking out a pleading completely divests a party of a hearing thus driving such party away from the judgment seat. Therefore, as stated in the preceding paragraphs, it must be used sparingly and in the clearest or obvious of cases.

I have perused the 1<sup>st</sup> Defendant's affidavit in support of the application to strike out originating process and expunge it from the record, and find it extremely vague and devoid of detail as the "flesh" the evidence is instead in the skeleton arguments. Counsel for the Plaintiff argues that the 1<sup>st</sup> Defendant's application is to "*strike out originating process*" whilst **Order 18 Rule 19 (1) Rules of the Supreme Court, 1999 Edition** refers to "*pleadings*". I opine that since the originating process is the process by which proceedings are commenced, that is, for instance, by way of writ of summons or originating summons supported by a statement of

claim or affidavit, these form part of pleadings. The Order cited by Counsel for the 1<sup>st</sup> Defendant's refers to the Statement of Claim and I opine that this falls within the ambit of pleadings envisaged in **Order 18 Rule 19 (1) Rules of the Supreme Court, 1999 Edition.**

Counsel for the 1<sup>st</sup> Defendant has made an omnibus application under **Order 18 Rule 19 (1), Rules of the Supreme Court, 1999 Edition**, which sets out four (4) grounds for striking out pleadings. Counsel for the 1<sup>st</sup> Defendant argues that the Statement of Claim is scandalous, vexatious and irrelevant on the basis that the Plaintiff's averments all refer to a Power of Attorney, and that all work undertaken by the Plaintiff was under the authority of the said Power of Attorney which was subsequently revoked. Counsel for the 1<sup>st</sup> Defendant argues that any reference to the said Power of Attorney is vexatious, scandalous, frivolous and should be expunged from the record.

In the skeleton arguments, Counsel for the 1<sup>st</sup> Defendant argues that the originating process be struck out and expunged from the record particularly paragraphs 3, 4, 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42 and 43 as these are

irrelevant whilst paragraphs 44, 45, 46 and 47 are vexatious. It must be noted that these paragraphs have not been referred to at all in the 1<sup>st</sup> Defendant's affidavit in support of the application.

In determining whether the Statement of Claim is scandalous, vexatious and frivolous, it is important to set out what constitutes a scandalous pleading. A pleading is scandalous if it states matters which are indecent and offensive, matters made for the purpose of abusing or prejudicing the opposite party, matters that are immaterial or unnecessary or which contain imputation of the defence. However, it may not be scandalous if the matter is relevant and admissible in evidence as held in the case of **Dawkins v Prince Edward of Save Weimber** <sup>13</sup>.

Counsel for the 1<sup>st</sup> Defendant argues that the pleadings are scandalous in that it infers dishonest dealings on the 1<sup>st</sup> Defendant by way of breach of fiduciary duty and breach of trust owed to the Plaintiff. In terms of what constitutes "scandalous", the sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material to the relief prayed for.

It is trite law that a pleading cannot be ordered to be struck out on grounds of being scandalous however unpleasant the allegation may be unless it is shown they are completely irrelevant and wholly unnecessary for the prosecution of the case (**RR deceased**) <sup>14</sup>. I concur with Counsel for the Plaintiff that the averments in the Statement of Claim are necessary and material to the issues for determination.

Counsel for the 1<sup>st</sup> Defendant argues that the Statement of Claim is vexatious. A matter is vexatious when it lacks good faith and is hopeless or offensive and tends to cause the opposite party to unnecessary anxiety trouble or expense. Instructive is the case of **Willis v Earl Beauchamp** <sup>15</sup>, where the Court considered a matter as being vexatious as it had no foundation and no chance of succeeding. In considering whether any proceedings are vexatious, the whole history of the matter ought to be looked at and not merely whether the pleading discloses a cause of action or not.

Counsel for the 1<sup>st</sup> Defendant argues that the Statement of Claim is irrelevant. In terms of "irrelevant" in pleadings, according to **Black's**

**Law Dictionary, 8th Edition, Thomson Reuters** it defines it as follows:

**"having no probative value; not tending to prove or disapprove a matter is issue; or having no substantial relation to the action and will not affect the court's decision"**

Counsel for the Plaintiff contends that the essence of the action relates to the contractual and fiduciary relationship between the Plaintiff and 1<sup>st</sup> Defendant and cannot be termed as vexatious, scandalous, frivolous or embarrassing. Further that the averments in the Statement of Claims are relevant particularly in proving breach of fiduciary duty or breach of trust. I concur with this position and instructive is the persuasive English case of **Belmont Finance Corporation Limited v Williams Furniture Limited** <sup>16</sup> where Buckley L.J held that:

**"An allegation of dishonesty must be pleaded with clearly and with particularity. This is laid down by the rules and it is a well recognised rule of practice. This does not import that the word "fraud" or the word "dishonesty"**

must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal, the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

I am in full agreement with the passage above, and in my view in a claim for breach of fiduciary duty or breach of trust, there is need to state the particulars with sufficient clarity and detail, which is what Counsel has done. I find that the 1<sup>st</sup> Defendant has not shown or proved that the averments in the Statement of Claim are scandalous, vexatious, or irrelevant. I find that, and therefore do not offend **Order 18 Rule 19 (1) (b) and (c) Rules of the Supreme Court, 1999 Edition.**

In the skeleton arguments, Counsel for the 1<sup>st</sup> Defendant argues that the statement of claim be struck out for being an abuse of court process and cites **paragraph (d) of Order 18 Rule 19 (1) Rules of the Supreme Court, 1999 Edition**. In support of this proposition, Counsel cites the case of **Tobacco Board of Zambia v Chishimba Konde** <sup>2</sup> and **Musa Ahmed Adam Yusuf v Mahtani Group of Companies** <sup>3</sup>. I agree with the principles laid out in the cited cases, but opine that no arguments were advanced to show that the Statement of Claim should be struck for being an abuse of court process and will therefore make no pronouncement on the same.

In respect to **Order 14A (1) and Order 33 Rule 7 Rules of the Supreme Court, 1999 Edition**, Counsel for the 1<sup>st</sup> Defendant argues that these Orders afford a prompt and summary method of disposing of groundless actions and of excluding immaterial issues. That the Court has power to dismiss any action or order Judgment to be entered accordingly. Rather than persuade me through the advancement of arguments, Counsel for the 1<sup>st</sup> Defendant chose to shy away. Suffice to say, I find that it is not appropriate at this stage of the proceedings to dispose of the matter as issues raised

can only be resolved after careful examination of the evidence from both sides at trial.

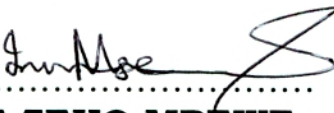
In the circumstances of the case, the net result is that the 1<sup>st</sup> Defendant's application to strike out originating process and expunge it from the record lacks merit and is accordingly dismissed.

It is ordered that the 1st Defendant files its defence within fourteen (14) days of the Ruling and the Plaintiff its Reply within seven (7) days of receipt of the defence. A scheduling conference shall be held on 6<sup>th</sup> July, 2017 at 08.40 hours.

Costs to the Plaintiff, to be taxed in default of agreement.

Leave to appeal granted.

Dated at Lusaka in Chambers this 31<sup>st</sup> day of May 2017.

  
.....  
**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**